MAKRO CASH & CARRY DISTRIBUTION (M) SDN BHD A

v.

HENRY BUTCHER, LIM & LONG (N) SDN BHD

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: P-02-146-2002]
19 MARCH 2010 C

CIVIL PROCEDURE: *Summary judgment - Appeal - Estate agent's claim for loss of commission - Whether there were issues that merited a full trial - Effective cause of purchase of subject land - Entitlement to commission - Quantum awarded - Interest - Statement of claim, whether amended - Rules of the High Court 1980, O. 14, O. 20 r. 9* D

AGENCY: *Agent - Estate agent - Loss of commission, claim for - Summary judgment - Whether there were issues that merited a full trial - Effective cause of purchase of subject land - Entitlement to commission - Quantum awarded - Interest - Statement of claim, whether amended - Rules of the High Court 1980, O. 14, O. 20 r. 9* E

The respondent obtained summary judgment under O. 14 Rules of the High Court 1980 ('RHC') against the appellant on its claim for loss of commission of 2% as an estate agent claiming to have introduced the subject land to the appellant, which the appellant subsequently purchased for RM33,800,000. The appellant's subsequent appeal against that decision of the senior assistant registrar was dismissed by the judge in chambers. Hence, the present appeal in which the appellant raised the following issues which it contended merited a full trial: (i) the respondent's introduction was not the effective cause of the appellant's purchase of the subject land; (ii) the statement of claim disclosed no cause of action for failure to state that the respondent was ever appointed by the appellant as its estate agent or that any commission was agreed, yet such commission was claimed; (iii) the quantum awarded was erroneous as it was based on the sale price of RM33,800,000 when the actual price paid for the subject land was RM30,060,000; and (iv) interest at 8% per annum from the date of purchase as per amended statement of claim was wrongly allowed as the statement of claim was in effect not amended to include such interest. F G H I

Held (allowing the appeal with costs)
Per Tengku Baharudin Shah JCA delivering the judgment of the court:

(1) Whose introduction – the respondent's or New Bob's (the other estate agent whose offer was accepted by the appellant) – was in fact the effective cause of the subject land's purchase was clearly an issue of fact which became open and arguable. The effectiveness of an agent's work is a matter of inference from the evidence. Whether there was a sufficient connection between the respondent's act and the ultimate transaction must be ascertained from the facts of the case. It was for the respondent to show that some act of his was the *causa causans* of the transaction or was an effective cause of the purchase. *Tribe v. Taylor* (refd); *Millar v. Radford* (refd); *Chew Teng Cheong v. Pang Choon Kong* (refd). (para 10)

(2) Although the sale price was stated as RM33,800,000 in the S&P Agreement, there was evidence that it was later reduced to RM30,060,000. Which figure should be used as a basis for calculating the commission was still an issue to be resolved. The dispute was further compounded by the undisputed fact that there was no agreement, written or oral, that the respondent would be paid any commission for services rendered or the rate of such commission, if any. Whether an agent or broker is entitled to any commission depends on the agreement between the parties and has to be proved by positive evidence. *Chew Teng Cheong v. Pang Choon Kong* (refd); *Tang Chiok Sing v. Lian Fatt Sawmill Co* (refd); *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* (refd). (paras 11 & 12)

(3) It was apparent that the fourth issue also justified appellate intervention. The writ and statement of claim was amended on 23 February 2001 pursuant to an order of court dated 12 January 2001. Though the writ showed that the amendment was made pursuant to an order dated 14 February 2001, the amending order showed the correct date as 12 January 2001. Order 20 r. 9 RHC requires any party given leave to amend a writ, pleading or other documents to do so within 14 days failing which the amending order ceased to have effect unless extended. Since the amendment here was made contrary to the

rule, it was rendered ineffective and any judgment on the claim as amended when it was actually not amended was a nullity. *MAE Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* (refd). (para 13)

(4) The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. For the aforementioned reasons, this was not a clear case for the exercise of such jurisdiction. There were *bona fide* issues of fact and law which should be resolved at a proper trial. *Malayan Insurance Sdn Bhd v. Asia Hotel Sdn Bhd* (refd). (paras 7 & 14)

[Case remitted for trial in the High Court.]

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memperolehi penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap perayu atas tuntutannya untuk kehilangan komisyen sebanyak 2% sebagai agen hartanah yang mendakwa telah memperkenalkan tanah berkenaan kepada perayu, yang mana perayu kemudiannya membeli untuk harga RM33,800,000. Rayuan kemudiannya perayu terhadap keputusan itu yang dibuat oleh penolong pendaftar kanan telah ditolak oleh hakim dalam kamar. Oleh itu, rayuan semasa di mana perayu membangkitkan isu-isu berikut yang ia menghujah perlukan suatu perbicaraan penuh: (i) perkenalan responden tidak merupakan punca efektif perayu membeli tanah tersebut; (ii) pernyataan tuntutan tidak mengemukakan apa-apa kausa tindakan kerana gagal menyatakan bahawa responden telah dilantik oleh perayu sebagai agen hartanahnya atau bahawa apa-apa komisyen telah dipersetujui, tetapi komisyen sebegitu dituntut; (iii) kuantum yang diawardkan adalah salah kerana ia berasaskan harga jualan RM33,800,000 apabila harga sebenar yang dibayar untuk tanah tersebut adalah RM30,060,000; dan (iv) bunga sebanyak 8% setahun dari tarikh pembelian mengikut pernyataan tuntutan yang dipinda telah dibenarkan dengan salah kerana pernyataan tuntutan sebenarnya tidak dipinda untuk mengandungi bunga sebegitu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:

(1) Perkenalan siapa – responden atau New Bob (agen hartanah lain yang membuat tawaran yang diterima oleh perayu) – adalah

sebenarnya punca efektif pembelian tanah tersebut jelas merupakan suatu isu fakta yang terbuka dan boleh dipertikaikan. Keberkesanan kerja seseorang agen adalah perkara yang perlu disimpulkan dari keterangan. Sama ada terdapat perhubungan yang mencukupi di antara tindakan responden dan transaksi muktamad mesti ditentukan dari fakta-fakta kes. Respondenlah yang perlu membuktikan bahawa suatu tindakannya adalah *causa causans* transaksi atau adalah punca efektif pembelian tersebut. *Tribe v. Taylor* (dirujuk); *Millar v. Radford* (dirujuk); *Chew Teng Cheong v. Pang Choon Kong* (dirujuk).

(2) Walaupun harga belian telah dinyatakan sebagai RM33,800,000 dalam Perjanjian Jual Beli, terdapat keterangan bahawa ia kemudiannya dikurangkan ke RM30,060,000. Angka mana yang sepatutnya digunakan sebagai asas bagi mengira komisyen masih merupakan satu isu untuk diselesaikan. Pertikaian tersebut menjadi lagi rumit disebabkan fakta yang tidak dapat dipertikaikan bahawa tiada perjanjian, bertulis atau lisan, bahawa responden akan dibayar apa-apa komisyen untuk perkhidmatan yang dilaksanakan ataupun kadar komisyen sedemikian, jika ada. Sama ada seseorang agen atau broker berhak mendapat apa-apa komisyen bergantung pada perjanjian di antara pihak-pihak dan perlu dibuktikan oleh keterangan positif. *Chew Teng Cheong v. Pang Choon Kong* (dirujuk); *Tang Chiok Sing v. Lian Fatt Sawmill Co* (dirujuk); *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* (dirujuk).

(3) Ia adalah jelas bahawa isu keempat juga mewajarkan campurtangan rayuan. Writ dan pernyataan tuntutan telah dipinda pada 23 Februari 2001 mengikut suatu perintah mahkamah bertarikh 12 Januari 2001. Meskipun writ menunjukkan bahawa pindaan telah dibuat mengikut suatu perintah bertarikh 14 Februari 2001, perintah meminda menunjukkan tarikh betul sebagai 12 Januari 2001. Aturan 20 k. 9 KMT perlukan mana-mana pihak yang diberi kebenaran untuk meminda suatu writ, pliding atau dokumen-dokumen lain untuk berbuat demikian dalam masa 14 hari dan jika gagal perintah meminda tidak akan mempunyai kesan kecuali jika dilanjutkan. Oleh kerana pindaan di sini dibuat bertentangan dengan kaedah tersebut, ia menjadi tidak berkesan dan apa-apa penghakiman atas tuntutan seperti dipinda apabila ia sebenarnya tidak dipinda adalah suatu pembatalan. *MAE Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* (dirujuk).

(4) Falsafah yang menjadi dasar peruntukan A. 14 ialah untuk menghalang seorang plaintif yang jelas berhak mendapat wang dari dilewatkan penghakimannya di mana tiada pembelaan yang boleh dihujahkan kepada tuntutan tersebut. Bagi sebab-sebab yang dikatakan, ini bukan suatu kes jelas untuk melaksanakan bidang kuasa sebegitu. Terdapat isu-isu fakta dan undang-undang *bona fide* yang seharusnya diselesaikan di perbicaraan betul. *Malayan Insurance Sdn Bhd v. Asia Hotel Sdn Bhd* (dirujuk).

[Kes diremitkan untuk dibicara di Mahkamah Tinggi.]

Case(s) referred to:

Chew Teng Cheong & Anor v. Pang Choon Kong [1983] 2 CLJ 117; [1983] CLJ (Rep) 86 FC ***(refd)***

MAE Sdn Bhd v. Perwira Habib Bank Malaysia Bhd, Kuala Terengganu [1999] 4 CLJ 709 HC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC

Millar v. Radford [1903] 191 CLR 575 ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***

Tang Chiok Sing v. Lian Fatt Sawmill Co [1976] 1 LNS 155 FC ***(refd)***

Tribe v. Taylor [1876] 1 CPD 505 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 20 r. 9

For the appellant - BE Teh; M/s Teh & Assoc
For the respondent - Sunny Khoo; M/s Ismail Khoo & Assoc

[Appeal from High Court, Pulau Pinang; Civil Suit No: MT1-22-495-2000]

Reported by Suresh Nathan

JUDGMENT

Tengku Baharudin Shah JCA:

[1] The respondent sought for and obtained summary judgment under O. 14 of the Rules of the High Court 1980 (the RHC) against the appellant on its claim for loss of commission of 2% as an estate agent who claimed to have introduced the subject land to

A the appellant which the appellant subsequently purchased for RM33,800,000. The appellant's appeal against the said decision of the Senior Assistant Registrar was dismissed by the learned judge in chambers.

B **[2]** It was the respondent's case that the appellant was in early 1994 looking for land in Penang for a planned hyper market. The appellant sought its assistance which was given by identifying a few pieces of land including the subject land, arranging visits and meetings and making searches thereon. The respondent however C found out later that the subject land was purchased by the appellant on 28 August 1996 without reverting to it and without paying its commission. Hence the claim for RM676,000 with 8% interest.

[3] The appellant averred that the respondent had no cause of D action for such commission as there was no agency agreement between them nor had the appellant ever agreed to pay the respondent such or any commission. When the respondent unilaterally introduced the subject land to the appellant, the appellant had no intention of buying the same. It was only after a E lapse of 15 months that the subject land was offered to the appellant by another estate agent (New Bob) on better terms with only 1% commission which it accepted.

[4] The learned judge held that an agent and principal relationship existed on the basis that the information gathering, F analysis and fact finding works were carried out by the respondent on the instructions of the appellant and that the appellant had taken advantage of the information gathered by the respondent to get a better bargain from New Bob. He also held that the lapse of 15 months did not break the chain of causation nor impliedly G terminate the contract of agency to disentitle the respondent of its commission.

[5] On the rate of commission at 2% of the purchase price the learned judge found it as normal because New Bob offered to charge H 1% as being half of its normal 2% commission while the Federal Court decision in *Pembangunan Maha Murni Sdn Bhd. v. Jururus Ladang Sdn Bhd.* [1985] 1 LNS 122 was distinguished for being made before the Valuers, Appraisers and Estate Agent Rules 1986 (the 1986 Rules) which set the maximum rate came into force.

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[6] Before us learned counsel for the appellant raised several issues which were contended to merit a full trial. They were: A

i. The respondent's introduction was not the effective cause of the appellant's purchase of the subject land.

ii. The statement of claim disclosed no cause of action for failure to state that the respondent was ever appointed by the appellant as its estate agent or that any commission was agreed, yet such commission was claimed. B

iii. The quantum awarded was erroneous being based on the sale price of RM33,800,000 when the actual price paid for the subject land was RM30,060,000. C

iv. Interest at 8% per annum from the date of purchase as per amended statement of claim was wrongly allowed because the statement of claim was in effect not amended to include such interest. D

[7] Having considered submissions of counsel we had no hesitation in allowing the appellant to have its day in court as there were *bona fide* issues of fact and law which should be resolved at a proper trial. We allowed the appeal with costs, set aside the judgment and remitted the case for trial in the High Court. E

[8] It is trite that O. 14 RHC is not intended to shut out a defendant. The provision should only be applied in cases where there is no reasonable doubt that the plaintiff is entitled to judgment. It should only be exercised in very clear cases. See *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182. The issue before us was whether this was such a case and that the learned judge on the pleadings and affidavits before him was justified in holding that there was no arguable defence. F G

[9] On the first issue, while the appellant admitted that the respondent introduced the subject land, it was contended that that was not the effective cause of its subsequent purchase by the appellant. The terms of offer were evidently not attractive being on the basis of an acquisition of shares of the company that only owned the subject land and without vacant possession (see exh. H I

A TPH2 at 149-151 AR). The appellant's terse reply five months later on 9 June 1995 (see exh TPH2 at 153 AR) upon the respondent's query bore the cold response to the offer. It reads:

> We are indeed still interested in land on Penang island. Please let us know when suitable pieces are available.

B which implied that the sites recommended were not suitable.

[10] The offer from New Bob only came 15 months later with terms which accorded with the appellant's requirement as C incorporated into the Sale and Purchase Agreement entered into on 9 September 1996 (the S&P Agreement – see exh. KWK1 at 170-189 AR) with added incentive of charging only half the said agent's normal commission of 2%. Whose introduction was in fact the effective cause of the purchase of the subject land was clearly an D issue of fact which became open and arguable. The effectiveness of an agent's work is a matter of inference from the evidence. Whether there is a sufficient connection between the respondent's act and the ultimate transaction must be ascertained from the facts of the case. It is for the respondent to show that some act of his was the *causa* E *causans* of the transaction or was an efficient cause of the purchase (see *Tribe v. Taylor* [1876] 1 CPD 505 and *Millar v. Radford* [1903] 191 CLR 575). Both cases were cited with approval by the Federal Court in *Chew Teng Cheong & Anor v. Pang Choon Kong* [1983] 2 CLJ 117; [1983] CLJ (Rep) 86 which appears to have been F misconstrued in the present case as authority for holding that mere introduction was sufficient to entitle an agent to a commission. The learned trial judge also erred in saying that the chain of events suggested that the appellant was taking advantage of the information gathered from the respondent and using it to get a G better bargain from New Bob. There was no such evidence.

[11] On quantum, though the sale price was stated as RM33,800,000 in the S&P Agreement, there was evidence that it was later reduced to RM30,060,000 (see exh. KWK6 and KWK7 at 195-197 AR). H Which figure should be used as basis for calculating the commission is still an issue to be resolved. The dispute was further compounded by the undisputed fact that there was no agreement, written or oral, that the respondent would be paid any commission for services rendered or the rate of such commission, if any.

I

[12] Whether an agent or broker is entitled to any commission depends on the agreement between the parties and has to be proved by positive evidence – see Federal Court in *Chew Teng Cheong v. Pang Choon Kong (supra)* and *Tang Chiok Sing v. Lian Fatt Sawmill Co.* [1976] 1 LNS 155). The then Supreme Court in *Pembangunan Maha Murni Sdn Bhd. v. Jururus Ladang Sdn Bhd. (supra)* held that there may be a common practice that estate agents are paid commissions by either the vendor or purchaser or both depending on the negotiation between the parties. But it had not developed into a recognised custom or usage for judicial notice to be taken that he is entitled to a commission of the purchase price and that the commission is at 2% thereof.

[13] It is apparent that the fourth issue also justified appellate intervention. The writ and statement of claim was amended on 23 February 2001 pursuant to Order of Court dated 12 January 2001. Though the writ at p. 8 AR shows that the amendment was made pursuant to an order dated 14 February 2001 the amending order at p. 16 AR shows the correct date as 12 January 2001. Order 20 r. 9 RHC requires any party given leave to amend a writ, pleading or other documents to do so within 14 days failing which the amending order ceased to have effect unless extended. As the amendment here was made contrary to the rule it was rendered ineffective and any judgment on the claim as amended when it was actually not amended was a nullity. (see *MAE Sdn Bhd. v. Perwira Habib Bank Malaysia Bhd, Kuala Terengganu* [1999] 4 CLJ 709).

[14] Finally we noted that the underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim (see *Malayan Insurance Sdn Bhd. v. Asia Hotel Sdn Bhd. (supra)*), but for the aforesaid reasons we found this not to be a clear case for the exercise of such jurisdiction. Otherwise we would be shutting out the appellant.